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No. 98-6322

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTONIO TONTON SLACK,

Petitioner,

v.

E. K. McDANIEL, Warden, Ely (Nevada) State Prison, and FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Do the provisions of AEDPA, specifically including 28 U.S.C. §2253(c) and 28 U.S.C. §2244(b) control the proceedings on appeal?

2. If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. §2253(c)?

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NO. 98-6322

In The
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ANTONIO TONTON SLACK,
Petitioner,

v.

E. K. McDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

I. STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b). provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under

section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court that applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. §2253(c) provides:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken in the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

II. STATEMENT OF THE CASE

On February 22, 1999, this Court granted certiorari on the following question: If a person's petition for habeas corpus

under 28 U.S.C. §2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiles the §2254 petition, are claims included within that petition that were not included within his initial §2254 filing "second and successive" habeas applications?

In the initial briefing the State of California filed an amici brief raising the issue of whether 28 U.S.C. §2253(c) as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 applied to Petitioner Antonio Slack's (hereinafter Slack) appeal. Oral argument, on the original question presented, was held on October 4, 1999.

On October 18, 1999, this Court ordered supplemental briefing on the two new questions regarding the applicability of the provisions of the AEDPA.

III. SUMMARY OF ARGUMENT

In *Hohn v. United* States, 524 U.S. 236 (1998), this Court implicitly acknowledged that the provisions of 28 U.S.C. §2253(c)(2) applied to a motion that was filed pre-AEDPA where the appeal was filed post-AEDPA. The *Hohn* case was in the same procedural posture as this case. While Slack's federal petition was filed pre-AEDPA, the only claims

at issue before this Court were first raised by Slack on December 24, 1997, one year and eight months after the effective date of the AEDPA. Joint Appendix (JA) 66-91.[1]

This Court determined in *Lindh v. Murphy,* 521 U.S. 320 (1997) that 28 U.S.C. §2254(d) did not apply to cases pending at the time the AEDPA was enacted. However, *Lindh* should not control this case because none of the claims at issue before this Court were pending when the AEDPA was enacted. Further, applying the AEDPA to Slack's claims is in keeping with this Court's case law recognizing Congress' decision to limit habeas corpus jurisdiction. *See Calderon v. Thompson*, 523 U.S. 538 (1998); *Felker v. Turpin,* 518 U.S. 651 (1996); *Lonchar v. Thomas,* 517 U.S. 314 (1996).

In addition, the legislative history of the AEDPA illustrates Congress' clear intent to enact meaningful, comprehensive habeas corpus reform in order to address the incessant collateral attacks on state court convictions. Failing to apply the provisions of the AEDPA to claims appearing for the first time months, if not years, after the act's effective date flies in the face of this congressional intent.

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1 All reference to the joint appendix is to the appendix filed with the initial briefs.

The applicability of the AEDPA should be based on the date the individual claims were first raised by the petitioner. If the claims were raised prior to the effective date pre-AEDPA law applies. If the claims were raised after the effective date the AEDPA applies. This method is in keeping with the intent of Congress as reflected in the legislative history of the AEDPA.

Applying different law to individual claims within a single petition is in keeping with current practice. Claims are already analyzed separately for purposes of exhaustion, procedural default and other affirmative defenses.

Finally, under 28 U.S.C. §2253(c)(2), as amended by the AEDPA, a certificate of appealability may only issue if the petitioner makes a substantial showing of the denial of a constitutional right. Slack is only appealing the dismissal of five of his claims as abusive. This purely procedural issue does not involve a constitutional right. Therefore, Slack is not entitled to a certificate of appealability.

IV. ARGUMENT

A. The provisions of the AEDPA, specifically including 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) should apply to Slack's claims.

On April 24, 1996, the AEDPA was signed into law creating substantial changes in chapter 153 of Title 28 of the United States Code governing habeas corpus proceedings in federal court. This Court has already determined that the new provisions of 28 U.S.C. 2254(d) do not apply retroactively to claims pending in federal court on the enactment date. *Lindh v. Murphy*, 521 U.S. 320 (1997). In *Lindh* this Court determined that because the newly enacted Chapter 154 was explicitly made applicable to cases pending on the enactment date Congress implicitly intended that the amendments to Chapter 153 only apply to cases that were filed after the enactment date.

However, subsequent to *Lindh* this Court decided *Hohn v. United States*, 524 U.S. 236 (1998). The *Hohn* case was in the same procedural posture as this case, a pre-AEDPA motion pursuant to 28 U.S.C. §2255 with a post-AEDPA appeal. Despite the fact that the *Hohn* case involved a pre-AEDPA petition the Eighth Circuit applied 28 U.S.C.

2253(c)(2) which required Hohn to obtain a certificate of appealability before his appeal would be heard.

The Eighth Circuit denied Hohn's application for a certificate of appealability and this Court granted certiorari to determine whether it had jurisdiction to review decisions denying applications for certificates of appealability. *Hohn* at 238-239. Nowhere in the *Hohn* decision did this Court indicate that it found the application of 28 U.S.C. §2253(c)(2) to Hohn's appeal problematic. This Court implicitly accepted the fact that the provisions of 28 U.S.C. §2253(c)(2) applied despite the fact that prior to the enactment of the AEDPA there was no requirement for a federal prisoner to obtain a certificate of appealability/probable cause before filing an appeal.

Also subsequent to this Court's decision in *Lindh v. Murphy*, 521 U.S. 320 (1997), the Eighth Circuit ruled that 28 U.S.C. §2253(c), as amended, applies to cases in which the appeal was filed post-AEDPA even though the petition was filed pre-AEDPA. *Tiedeman v. Benson*, 122 F.3d 518 (1997). The Eighth Circuit recently reaffirmed that ruling in a case decided subsequent to the first round of oral arguments in this

case. *Jackson v. Ganmon*, No. 99-1330, 1999 U.S. App. Lexis 27898 (8th Cir. October 28, 1999). *Contra, Conde v. Henry*, No. 98-56445, 1999 U.S. App. Lexis 31554 (9th Cir. December 3, 1999).

Further, the negative inference referred to in *Lindh* is not applicable to this case because all of Slack's claims at issue before this Court first appeared in his third amended petition filed in the federal district court on December 24, 1997, one year and eight months after the effective date of the AEDPA. JA 66-91. Therefore, Slack's claims were not pending when the AEDPA was passed and its provisions should govern these claims.

Respondents' position is in keeping with this Court's long recognition of the need to limit habeas corpus jurisdiction. Most recently this Court stated:

> In light of "the profound societal costs that attend the exercise of habeas jurisdiction," . . . we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief. . . .
>
> These limits reflect our enduring respect for "the State's interest in the finality of convictions that have survived direct review within the state court system." . . . Finality is essential to both the retributive and the deterrent

> functions of criminal law. "Neither innocence nor just punishment can be vindicated until the final judgment is known." . . .
>
> "Without finality, the criminal law is deprived of much of its deterrent effect." . . .
>
> Finality also enhances the quality of judging. There is perhaps "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." . . .

Calderon v. Thompson, 523 U.S. 538, 554-555 (1998) (internal citations omitted).

This Court has also recognized that judgments about the proper scope of the writ are normally for Congress to make. *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996). Such a judgment is exactly what Congress made when it enacted the AEDPA.

Limitations on the writ are necessary because, despite Congress' enactment of the AEDPA, convicted prisoners are still attempting to circumvent the new provisions. For example, some prisoners have attempted to circumvent the AEDPA by filing Federal Rule of Civil Procedure 60(b) motions instead of petitions for writs of habeas corpus. *See Fierro v. Johnson*, No. 98-50562, 1999 U.S. App. Lexis 30439

(5th Cir. November 23, 1999); *United States v. Rich*, 141 F.3d 550 (5th Cir. 1998).

The claims at issue in this case appeared for the first time ever one year and eight months after the effective date of the AEDPA. Slack should not be allowed to circumvent the AEDPA as to these claims.

Not applying the AEDPA to claims raised after the effective date but in a proceeding that technically began prior to the effective date would lead to absurd results such as in the case of *Calderon v. The United States District Court for the Central District of California (Kelly)*, 163 F.3d 530 (9th Cir. 1998). In *Kelly*, the petitioner filed a petition for the appointment of counsel in order to prepare a federal habeas petition in 1992 and 1993. *Id.* at 532-533. From 1992 through 1997 the petitioner did not file any petition. Apparently petitions were finally filed in 1998. The Ninth Circuit held that since the petitioner had requested counsel his case was pending on the effective date of the AEDPA. Therefore the Act did not apply to his petitions even though no claims for relief were asserted until approximately two years

after the effective date. Such a result flies in the face of Congress' intent, as discussed below, in enacting the AEDPA.

Respondents' position is supported by the legislative history of the AEDPA. On March 24, 1995, Senator Specter (Pennsylvania) introduced S. 623, a bill designed to reform the use of the federal writ of habeas corpus. 141 Cong. Rec. S4590-S4596. In introducing the bill Senator Specter explained that habeas corpus reform was necessary because the writ of habeas corpus has "been applied in a crazy-quilt manner with virtually endless appeals that deny justice to victims and defendants alike, making a mockery of the justice system." 141 Cong. Rec. S4591.

Senator Hatch (Utah), co-sponsor of the bill described it as follows:

> Habeas corpus reform must not discourage legitimate petitions that are clearly meritorious and deserve close scrutiny. Meaningful reform must, however, stop repeated assaults upon fair and valid State convictions through spurious petitions filed in Federal court.
>
> As a consequence, the reform proposal Senator Specter and I have introduced sets time limits to eliminate unnecessary delay and to discourage those who would use the system to prevent the imposition of a just sentence.

> Manufactured delays breed contempt for the law and have a profound effect on the victims of violent crime. . . . .After all, finality is a hallmark of a just system, and must be maintained in order to preserve the legitimacy of the criminal process.

141 Cong. Rec. S4596.

Senator Hatch subsequently called the habeas corpus reforms:

> the most important stage in criminal law in the last 30 years, and maybe in our lifetime. This is a change to stop the incessant frivolous appeals that are eating our country alive. We have the chance to really, really do something about this while at the same time protecting constitutional rights and civil liberties for everybody, and doing it in an appropriate, legally sound manner.

141 Cong. Rec. S7849.

Similar sentiments were expressed in the House of Representatives. Congressman Lucas (Oklahoma), in addressing the endless appeals process in capital cases, stated "I stand here today and say enough is enough. Support fundamental habeas corpus reform." 142 Cong. Rec. H2141.

In addition, the reforms enacted by the AEDPA were not a new development. The Senators and Congressmen involved had been attempting to pass meaningful habeas

corpus reform for approximately fifteen years. During the debates on the AEDPA Congressman Hyde (Illinois) stated:

> Now, habeas corpus reform, that is the Holy Grail. We have pursued that for 14 years, in my memory. The absurdity, the obscenity of 17 years from the time a person has been sentenced till that sentence is carried out through endless appeals, up and down the State court system, and up and down the Federal court system, makes a mockery of the law.

142 Cong. Rec. H3606.

What the foregoing legislative history makes clear is that Congress intended the AEDPA to effect meaningful, comprehensive reform of habeas corpus proceedings in federal court. While abuses in capital cases was of major concern the reforms were not limited to death penalty cases. As Senator Specter stated on June 7, 1995, it was "time to move ahead with legislation to reform habeas corpus in all cases." 141 Cong. Rec. S7803.

The main purpose of the AEDPA was to stop the endless rounds of litigation by state prisoners. Congress certainly would not have intended that the provisions of the act would not apply to claims appearing for the very first time one year and eight months after the effective date.

Respondents submit that applying the AEDPA to claims that appear for the first time after the effective date of the act is in keeping with congressional intent and would not be unduly burdensome on the courts or on the parties. Determining whether pre or post-AEDPA law applies to an individual claim would be a simple matter of looking at the date the claim first appeared in the case. This is a bright line rule that would not lead to confusion or additional litigation.

In addition, claims within a petition are treated independently as a matter of course. Some claims may be unexhausted in which case the petitioner may abandon them and proceed with his exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 520-521 (1982). Some claims may have been procedurally defaulted in state court in which case they will have to be analyzed separately to determine if the petitioner is able to demonstrate cause and prejudice to overcome the default. *See Coleman v. Thompson*, 501 U.S. 722 (1991). If a petitioner is able to meet this standard for some of his claims but not others he may proceed only with those claims for which he has demonstrated cause and prejudice.

In this case, the five claims at issue before this Court were dismissed as abusive under Rule 9(b) by the federal district court. JA 152-160. In addition, one of Slack's claims was dismissed as unexhausted. *Id.*[2] The court looked at each individual claim and, applying different law to the claims requiring it, reached the correct result.

The same distinction is made by appellate courts. Denial of a habeas corpus petition is reviewed de novo. *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995). However, factual findings relevant to the district court's determination are reviewed for clear error. *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir. 1996). A district court's decision not to review the merits of a claim because it is abusive or successive is reviewed for an abuse of discretion. *Campbell v. Blodgett*, 997 F.2d 512 (9th Cir. 1992). In addition, a presumption of correctness is accorded to factual findings made by the state court. *Melugin v. Hames*, 38 F.3d 1478 (9th Cir. 1994). Therefore, courts are applying different standards of review to different aspects of the same claim as well as to individual claims within the same petition.

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2 Because the five claims were dismissed as abusive the district court did not reach Respondents' argument that they were also unexhausted. JA 157.

The point is that courts apply different law and different standards to individual claims within a single petition all of the time. Applying pre and post-AEDPA law to claims within the same petition would not be a significant departure from current practice.

Respondents were unable to find any case in which a court applied pre and post-AEDPA law in the manner proposed. However, at least one federal court has taken a similar course of action in the sexual harassment arena. In *Mills v. Amoco*, 872 F.Supp. 975 (S.D.GA 1994), the plaintiff brought a sexual harassment complaint alleging conduct that occurred both before and after the effective date of the Civil Rights Act of 1991. This Court has held that the remedial provisions of Title VII of the 1991 Act do not apply to pre-enactment conduct. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The federal district court in *Mills* held that the plaintiff could recover punitive and compensatory damages under the 1991 Act for the conduct that occurred after the effective date but could not recover such damages for conduct that occurred before the effective date. Since determining

which law applied was based solely on the date of the conduct the distinction was easy to make.

Likewise, in habeas corpus cases the determination of when to apply the AEDPA would be easy to make. If a claim is raised for the first time after April 24, 1996, the provisions of the AEDPA would apply. If a claim is raised in a pleading before April 24, 1996, pre-AEDPA law would apply. This practice would not be unduly burdensome and is in keeping with the congressional intent reflected in the AEDPA's legislative history.

Finally, this Court's decision in the *Lindh* case is distinguishable in that *Lindh* involved the application of 28 U.S.C. §2254(d) to cases pending on the AEDPA's effective date. Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d) deals with the determination of an individual claim on its merits and dictates a strong deference to decisions of state courts. This provision significantly narrows the merits review of the federal district courts for claims that were decided on their merits in state court and thus has a substantive effect on petitions.

In contrast 28 U.S.C. §2244(b) is purely procedural in that it dictates the procedures which must be followed before a state prisoner is allowed a second round of federal habeas review. In addition, 28 U.S.C. §2253(c) only governs the procedures for appeals from the denial of habeas corpus petitions. Changes in procedural rules may be applied to cases arising prior to their enactment. *Landgraf v. USI Film Products*, 511 U.S. 244, 275 (1994).

Section 2253(c) should certainly apply to Slack's case. As the Eighth Circuit has stated "we can think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of

a case in a trial court, instead of on the filing of a notice of appeal or similar document." *Tiedman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

Respondents submit that the applicable date for determining the applicability of section 2244(b) should be the date the claims at issue are filed in the district court. In addition, the relevant date for determining if section 2253(c) applies should be the date the appeal is filed. Otherwise situations would arise, such as this case, in which claims appearing for the first time months, if not years, after the effective date of the AEDPA would still be governed under the old law. Such a result is contrary to the clear intent of Congress to enact meaningful reforms that address the incessant delays in federal habeas corpus.

B. Slack is not entitled to a certificate of appealability under 28 U.S.C. §2253(c).[3]

Prior to the effective date of the AEDPA a state prisoner was required to obtain a certificate of probable cause in order to appeal the denial of his federal habeas petition. *Former* 28 U.S.C. §2253(c)(1)(A). Under the old system a

3 This question is covered extensively in the Amici States' brief. In the interest of judicial economy Respondents' argument will be brief in order to avoid duplication of effort.

certificate of probable cause would not issue unless the petitioner made a substantial showing of the denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In order to make such a showing a petitioner was required to demonstrate that "the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner] or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id.* at 893, n. 4 (internal citations omitted).

In contrast, 28 U.S.C. §2253(c)(2), as amended by the AEDPA, provides that a certificate of appealability may only issue if the applicant has made a substantial showing of the denial of a constitutional right. The Ninth Circuit has indicated that the new standard under AEDPA is more demanding than the standard for obtaining a certificate for probable cause under the old law. *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). In addition, the Fourth Circuit has held that a petitioner's claims that his rights were violated under the Vienna Convention does not satisfy the new standard under sections 2253(c)(2) because the Vienna Convention does not create any constitutional rights. *Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997).

Congress is presumed to know the law that is in effect at the time it enacts a new statute. *See Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 n. 66 (1982). If Congress had intended to simply codify the *Barefoot* standard it would not have changed the applicable language from a federal right to a constitutional right. It is generally presumed that Congress acts intentionally and purposefully. *See Hohn v. United States*, 524 U.S. 236, 250 (1998); *United States v. Valdez*, No. 98-35526, 1999 U.S. App. Lexis 29686 *7, (9th Cir. November 12, 1999). Respondents submit that by changing the standard to require a denial of a constitutional right Congress intended to make the standard to obtain an appeal more demanding. Therefore, procedural issues that could previously be appealed are no longer permitted because, while they may involve federal rights, they in no way implicate the constitution.

In this case, Slack is appealing the dismissal of five of his claims for relief as abusive. This is a procedural issue that does not involve constitutional rights. *See Felker v. Turpin*, 518 U.S. 651 (1996). Since Slack is not raising a constitutional issue he is unable to meet the standard of a

"substantial showing of the denial of a constitutional right" under 28 U.S.C. §2253(c)(2). Therefore, Slack is not entitled to a certificate of appealability.

V. CONCLUSION

The provisions of 28 U.S.C. §2244(b) and 28 U.S.C. §2253(c) should be applied to Slack's petition. Since Slack is unable to make the required showing to obtain a certificate of appealability pursuant to 28 U.S.C. §2253 his appeal should be dismissed.

Dated: December, 1999.

Respectfully submitted,

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